

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Local Exchange Carriers' Rates,) CC Docket No. 93-162
Terms and Conditions for)
Expanded Interconnection for)
Special Access)

REPLY OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby submits its reply in response to the comments filed by Southwestern Bell Telephone Company ("Southwestern Bell") and U S West Communications, Inc. ("U S West") on the Petition for Clarification filed by the Bell Atlantic Telephone Companies ("Bell Atlantic") in the above-captioned proceeding.

For the most part, the comments of Southwestern Bell and U S West restate the same positions and arguments made in the Bell Atlantic Petition for Clarification. As MFS discussed in its Opposition to Bell Atlantic Petition for Clarification, Bell Atlantic's petition misrepresents established Commission policy, misreads relevant Commission decisions and court precedent, and ignores critical public policy determinations. The comments of Southwestern Bell and U S West are similarly flawed and without merit. Contrary to the claims of Bell Atlantic, Southwestern Bell and U S West, the Commission's *Supplemental Designation Order*¹ is fully consistent with

¹ *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, 9 FCC Rcd 2742 (1994) ("*Supplemental Designation Order*").

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established Commission policy and relevant court precedent. Therefore, the Commission should deny Bell Atlantic's Petition for Clarification.

Southwestern Bell and U S West misread the decision in *Southwestern Bell Tel. Co. v. FCC*² in an attempt to buttress Bell Atlantic's claim that individual case basis ("ICB") arrangements are not generally-available, common carrier services. Southwestern Bell claims that the language in the *Supplemental Designation Order* stating that "[o]nce sufficient knowledge is gained about the costs of service, the Commission requires that ICB rates be converted to averaged rates applicable to all customers" contradicts the *Remand Decision*. Southwestern Bell comments at 1-2. Southwestern Bell argues that the *Remand Decision* "made it clear that an ICB arrangement -- in and of itself -- could not subject a carrier to Title II regulation." Southwestern Bell Comments at 2. Similarly, U S West asserts that the *Supplemental Designation Order* statement that "ICB service constitutes general common carrier offerings 'if tariffs embodying these rates are filed and are available to all similarly situated customers'" appears to be inconsistent with the *Remand Decision* holding. U S West Comments at 1-2. U S West also argues that "[s]ervices provided on an ICB basis are not general carrier offerings" U S West comments at 2. Contrary to these unfounded claims, the *Remand Decision* did not find a long-standing Commission policy that ICB arrangements are not generally-available, common carrier services. The Court of Appeals' decision was restricted to the dark fiber

² 19 F.3d 1475 (D.C. Cir. 1994) ("*Remand Decision*").

services that were the subject of the Commission orders under appeal.³ As such, the *Remand Decision* cannot be read to apply to Bell Atlantic's expanded interconnection services, which are the subject of Bell Atlantic's petition. Moreover, the Court did not find that dark fiber services are not common carrier offerings. Instead, the Court held that the Commission had not provided adequate support for its exercise of Title II jurisdiction over dark fiber. In remanding the dark fiber orders to the Commission for further consideration, the Court stated:

Without expressing any opinion on whether the Commission may have a *different* and adequate reason for regulating dark fiber, [the Court is] not satisfied with the logic underlying the orders as they stand now.⁴

Therefore, the *Remand Decision* did not establish or limit the Commission's Title II authority over dark fiber or any other LEC ICB service offerings. Indeed, the Court's decision remanding the dark fiber orders for further Commission deliberation stated that dark fiber may well fall within the Title II or other jurisdiction of the Commission.⁵ The references by Southwestern Bell and U S West to the *Remand Decision* clearly are overreaching, and cannot provide support for Bell Atlantic's petition.

Southwestern Bell claims that the language in the Commission's recent

³ *Id.* at 1484. ("Because we find that the Commission provided insufficient support for concluding that the petitioners had offered dark fiber service on a common carrier basis we remand the three orders to the Commission for reconsideration on the basis of its authority to regulate dark fiber service without reaching petitioner's other contentions.")

⁴ *Id.* at 1480-81.

⁵ *Id.*

Supplemental Designation Order reflects a "dissonant application of policy regarding ICB pricing" because the Commission did not require Southwestern Bell's competitors' rates to be converted to averaged rates applicable to all customers. Southwestern Bell Comments at 3 (citing *Teleport Communications Group Operating Companies*, 8 FCC Rcd. 3611 (1993) ("*Teleport Tariff Order*"). Southwestern Bell's discussion of the Teleport tariff is irrelevant to the issue of whether ICB services are generally-available, common carrier services subject to Title II jurisdiction. In the *Teleport Tariff Order*, the Commission did not find that ICB offerings were not Title II services. Indeed, the Commission did not address the issue of Title II jurisdiction at all in that order. Moreover, in a subsequent order,⁶ the Common Carrier Bureau rejected Southwestern Bell's argument that it wished to take advantage of the same flexibility as competitive access providers to enter into individualized contracts for tariffed services and special services. In doing so, the Bureau found that applying disparate levels of tariff scrutiny to dominant and nondominant carriers is fully consistent with the Commission's statutory authority and the public interest.⁷ Thus, Southwestern Bell's reference to the *Teleport Tariff Order* is inapposite and fails to support Bell Atlantic's Petition for clarification.

⁶ *Southwestern Bell Tel. Co.*, 9 FCC Rcd 2683 (1994).

⁷ *See id.* at 2686; *see also*, *Tariff Filing Requirements for Nondominant Carriers*, 8 FCC Rcd 6752, 6754 n. 21 (1994) ("We find that the nondominant/dominant dichotomy is grounded on a rational distinction between different classes of carriers that are not similarly situated...."); *Southwestern Bell Tel. Co.*, 9 FCC Rcd 1883 (1994) (Common Carrier Bureau noted that disparate treatment for tariff regulation is based on lack of market power of nondominant carriers.).

U S West urges the Commission to modify its language in the *Supplemental Designation Order* by stating that "[w]hile ICB offerings appear in LEC tariffs, they are not tariffed as generally available common carrier services." U S West Comments at 4. Under U S West's proposal, LECs would have broad authority to craft private service carrier arrangements and circumvent Commission scrutiny of service rates under Title II by establishing charges on an ICB basis.⁸ As a result, LECs would have the ability to unilaterally eliminate any effective and timely means for the Commission and interested parties to determine whether rates for services offered on an ICB basis are reasonable. Such an outcome clearly would violate the Communication Act's prohibition against excessive and unreasonably discriminatory rates, and would profoundly inhibit the growth of competition for local services.

Alternatively, U S West proposes that when the Commission decides that a LEC has offered "too many" ICB configurations of a particular service, LECs should have the option of making a general offering or withdrawing the service. U S West Comments at 2-3. Such an option is not practicable because it would lead to considerable uncertainty for customers and could cause disruptions in customers' businesses. For example, a LEC decision to withdraw service after making an ICB configuration of a particular service available would be highly disruptive to customers that had incorporated such service offerings into their networks. The U S West proposal would therefore impose

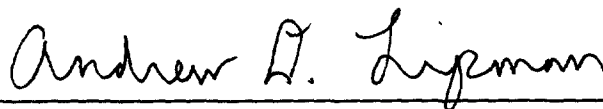
⁸ U S West's proposal would not pass judicial muster in light of the Court of Appeals' statement in the *Remand Order* that "a carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers." 19 F.3d at 1481.

considerable uncertainty in telecommunications markets and would raise the likelihood of service disruptions. As such, this proposal would not serve the public interest, and cannot provide grounds to support the Bell Atlantic Petition for Clarification.

CONCLUSION

As discussed herein, the Commission's *Supplemental Designation Order* is fully consistent with established Commission policy and relevant court precedent. Nothing in the comments of Southwestern Bell and U S West show otherwise. The Commission should therefore deny Bell Atlantic's Petition for Clarification.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September 1994, copies of the foregoing
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